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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
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11 ROSA NUNO,) No. ED CV 10-00188-VBK
12)
13 Plaintiff,) MEMORANDUM OPINION
14) AND ORDER
15 v.)
16) (Social Security Case)
17 MICHAEL J. ASTRUE,)
18 Commissioner of Social)
19 Security,)
20 Defendant.)
21 _____)
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18 This matter is before the Court for review of the decision by the
19 Commissioner of Social Security denying Plaintiff's application for
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have
21 consented that the case may be handled by the Magistrate Judge. The
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to
23 enter judgment upon the pleadings and transcript of the record before
24 the Commissioner. The parties have filed the Joint Stipulation
25 ("JS"), and the Commissioner has filed the certified Administrative
26 Record ("AR").

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") properly

1 considered the treating physician's opinion regarding the
2 need for Plaintiff to avoid repetitive twisting;

3 2. Whether the ALJ properly considered the treating physician's
4 opinion regarding Plaintiff's need for a ten-minute break
5 every hour;

6 3. Whether the ALJ properly evaluated Plaintiff's residual
7 functional capacity; and

8 4. Whether the ALJ posed a complete hypothetical question to
9 the vocational expert.

10 (JS at 2-3.)

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12 This Memorandum Opinion will constitute the Court's findings of
13 fact and conclusions of law. After reviewing the matter, the Court
14 concludes that the decision of the Commissioner must be affirmed.

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16 I

17 **THE ALJ PROPERLY CONSIDERED THE OPINION OF DR. STEIGER**

18 In her first issue, Plaintiff asserts that the ALJ failed to
19 properly consider the opinion of her "treating physician," Dr.
20 Steiger. (JS at 3-12.)

21 Following an on-the-job injury which she suffered on April 2,
22 2004 (AR 162), Plaintiff was evaluated by Dr. Steiger on September 24,
23 2004 (AR 162-68), then referred out for an MRI, following which she
24 was examined by Dr. Steiger for a second time on November 1, 2004. (AR
25 155-61.) Plaintiff was not again seen by Dr. Steiger. The primary
26 purpose of Plaintiff's examinations by Dr. Steiger was in connection
27 with her workers' compensation case. Dr. Steiger diagnosed
28 musculoligamentous sprain, lumbar spine, with left lower extremity

1 radiculitis; a disc bulge at L5-S1 of 5-6 mm, and at L4-5 of 3 mm; and
2 bilateral facet hypertrophy, at L4-5 and L5-S1. (AR 158.) Based on
3 his examinations, and the MRI findings, Dr. Steiger recommended
4 restrictions from heavy lifting or repeated bending and stooping, and
5 advised that Plaintiff should avoid repetitive twisting and prolonged
6 sitting. (AR 159.)

7 On August 28, 2007, at the request of the Department of Social
8 Services, Plaintiff received a complete orthopedic evaluation ("CE")
9 from Dr. Sophon. (AR 180-84.) Based on his evaluation, Dr. Sophon
10 opined that Plaintiff is able to lift and carry 50 pounds
11 occasionally, 25 pounds frequently, and that she is able to sit, stand
12 and walk six hours out of an eight-hour day. (AR 184.)

13 At the hearing before the ALJ (AR 20-52), testimony was taken
14 from Dr. Lorber, the Medical Expert ("ME"). Dr. Lorber reviewed all
15 of the available medical evidence, and rendered his own opinion that
16 Plaintiff is capable of lifting up to 20 pounds, frequently 10 pounds;
17 that she may occasionally bend, stoop and crouch, but should not kneel
18 or crawl; she cannot work at unprotected heights, or around dangerous
19 moving machinery, and should not be exposed to concentrated vibration.
20 She should not balance, climb ladders, scaffolds or ropes. She may
21 stand and/or walk for a period of at least four hours per day, but not
22 more than one hour at a time. She may sit for a total of at least six
23 hours per day, but not more than one hour at a time. She does not
24 require any other exertional, environmental or manipulative
25 restrictions. (AR 27-28.)

26 In his decision, the ALJ reviewed the reports and opinions of
27 various physicians, including Drs. Steiger and Sophon, and the State
28 Agency physicians, in addition to Plaintiff's treatment by a family

1 nurse practitioner. (AR 14-17.) The ALJ essentially adopted the
2 functional restrictions found by the ME in arriving at Plaintiff's
3 residual functional capacity ("RFC"), at Step Four of the sequential
4 evaluation process. (AR 17.)

5 Plaintiff finds fault in the ALJ's determination of her RFC
6 because she contends that the ALJ failed to address Dr. Steiger's
7 opinion that Plaintiff was incapable of repetitive twisting. For the
8 reasons set forth below, the Court disagrees.

9 First, a careful examination of the ALJ's RFC would indicate that
10 he did not, in fact, fail to address or in fact reasonably incorporate
11 Dr. Steiger's functional limitations. As the Commissioner notes,
12 pursuant to Social Security Ruling ("SSR") 96-8P, non-exertional
13 limitations include "postural" aspects, which include such activities
14 as twisting. Thus, in precluding Plaintiff from more than occasional
15 postural limitations such as bending, stooping and crouching (AR 12),
16 the ALJ effectively incorporated Dr. Steiger's limitation against
17 "repetitive" twisting types of postural movements. The absence of the
18 word "twisting" in the discussion of postural limitations incorporated
19 in the ALJ's RFC is of de minimis significance in view of its overall
20 import.

21 The Court also questions Plaintiff's characterization of Dr.
22 Steiger as her treating physician, despite the fact that Dr. Steiger
23 may have so characterized himself in the heading of his two reports.
24 A treating physician, however, is defined in the Social Security
25 context as a doctor who has an "ongoing treatment relationship" with
26 his or her patient. (See 20 C.F.R. §404.1502.) As stated in the
27 regulation, "Generally, we will consider that you have an ongoing
28 treatment relationship with an acceptable medical source when the

1 medical evidence establishes that you see ... the source with a
2 frequency consistent with accepted medical practice for the type of
3 treatment and/or evaluation required for your medical condition(s)."
4 The regulation also notes that a treating source is not one who
5 provides an evaluation in support of a claim for disability. It can
6 certainly be viewed that Dr. Steiger's position as the evaluating
7 physician for Plaintiff's workers' compensation claim would fall into
8 that exception. The Court would note, however, that it is not the
9 infrequency or the temporal limitation of Dr. Steiger's relationship
10 with Plaintiff (e.g., two examinations in 2004) which is determinative
11 in and of itself, because even a physician who infrequently sees a
12 patient may, under certain circumstances, be considered a treating
13 source. Rather, it is the fact that considering Plaintiff's extreme
14 complaints of disability, it would be expected that she would have a
15 more extensive relationship with a treating source than is reflected
16 in simply two examinations by a physician for workers' compensation
17 purposes at or around the time of her on-the-job injury. Indeed, the
18 record here reflects that after seeing Dr. Steiger in 2004, Plaintiff
19 did not undergo any medical treatment whatsoever until approximately
20 2006, when she began seeing a nurse practitioner.

21 Lending further support to the conclusions of the ALJ with regard
22 to Plaintiff's functional limitations is the fact that the ALJ
23 determined Plaintiff's RFC for a reduced range of light work and
24 occasional postural activities as even more conservative or
25 restrictive than Dr. Steiger's opinion which only precluded Plaintiff
26 from heavy lifting and repeated postural activities.

27 Even if Dr. Steiger is viewed as a treating physician, his
28 opinion is not necessarily conclusive as to either Plaintiff's

1 physical condition or the ultimate issue of her disability. Further,
2 the ALJ may reject the opinion of a treating or examining physician in
3 favor of the opinion of a non-treating, non-examining medical expert.
4 The rule is succinctly stated in Morgan v. Apfel, 169 F.3d 595, 602
5 (9th Cir. 1999):

6 "The opinion of a nonexamining medical advisor cannot
7 by itself constitute substantial evidence that justifies the
8 rejection of the opinion of an examining or treating
9 physician. (citations omitted) In Gallant [Gallant v.
10 Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984)], we determined
11 that 'the report of [a] nontreating, nonexamining physician,
12 combined with the ALJ's own observation of [the] claimant's
13 demeanor at the hearing,' did not constitute substantial
14 evidence and, therefore, did not support the Commissioner's
15 rejection of the examining physician's opinion that the
16 claimant was disabled. Gallant, 753 F.2d at 1456. In
17 Pitzer [Pitzer v. Sullivan, 908 F.2d 502 (9th Cir. 1990)],
18 we held that the nonexamining physician's opinion 'with
19 nothing more' did not constitute substantial evidence.

20 But we have consistently upheld the Commissioner's
21 rejection of the opinion of a treating or examining
22 physician, based *in part* on the testimony of the
23 nontreating, nonexamining medical advisor. [citations
24 omitted] In Magallanes [Magallanes v. Bowen, 881 F.2d 747
25 (9th Cir. 1989)], evidence that supported the ALJ's
26 determination included, among other things, testimony from
27 the claimant that conflicted with her treating physician's
28 opinion." [citation omitted]

1 (169 F.3d at 602)

2 Also instructive is the Ninth Circuit's discussion of this issue
3 in Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995):

4 "Where the opinion of the claimant's treating physician
5 is contradicted, and the opinion of a nontreating source is
6 based on independent clinical findings that differ from
7 those of the treating physician, the opinion of the
8 nontreating source may itself be substantial evidence; it is
9 then solely the province of the ALJ to resolve the conflict.
10 Magallanes, 881 F.2d at 751. Where, on the other hand, a
11 nontreating source's opinion contradicts that of the
12 treating physician but is not based on independent clinical
13 findings, or rests on clinical findings also considered by
14 the treating physician, the opinion of the treating
15 physician may be rejected only if the ALJ gives specific,
16 legitimate reasons for doing so that are based on
17 substantial evidence in the record. Id. at 751, 755. See
18 Ramirez v. Shalala, 8 F.3d 1449, 1453 (9th Cir. 1993)
19 (applying test where ALJ relied on contradictory opinion of
20 nonexamining medical advisor)."

21 (53 F.3d at 1041.)

22
23 Based on all of the foregoing, the Court determines that the ALJ
24 did not err in his evaluation of Dr. Steiger's opinion.

25 Plaintiff asserts a related second issue concerning Dr. Steiger's
26 opinion. She finds fault with the ALJ's failure to include Dr.
27 Steiger's limitation on Plaintiff's exertional capacity. Dr. Steiger
28 opined that Plaintiff would require, in a work setting, a ten-minute

1 break every hour. (AR 162-68.) That specific limitation was not
2 included in the ALJ's RFC. Again, however, the Court does not find
3 error in this portion of the ALJ's decision.

4 The principal point is that error cannot be found because Dr.
5 Steiger did not incorporate a ten-minute break into any of his
6 opinions; rather, the discussion in Dr. Steiger's first report of
7 September 24, 2004 of this issue is under the "History of Injury"
8 portion, in which Dr. Steiger indicates that Plaintiff had reported
9 that she was to take ten-minute breaks every hour. (AR 163.) Clearly
10 this does not constitute Dr. Steiger's objective opinion, but, rather,
11 a reflection of the medical history that he took from Plaintiff during
12 his first examination of her. After Dr. Steiger referred Plaintiff
13 for an MRI, he then rendered a second opinion following re-
14 examination, in November 2004. In this report (AR 155-61), Dr.
15 Steiger did not at all discuss any requirement that Plaintiff would
16 need to take a break every hour. Despite that, the ALJ, relying upon
17 the ME's testimony at the hearing, found that every hour, Plaintiff
18 would need to take breaks from sitting, standing or walking. (AR 12,
19 28.)

20 Based on the foregoing, the Court can find no error with regard
21 to Plaintiff's second issue concerning rest breaks.

22 Plaintiff's third issue follows from the first two issues, in
23 raising questions about the RFC as found by the ALJ. But here,
24 Plaintiff merely incorporates her first two issues, concerning
25 asserted omissions in the ALJ's findings of Plaintiff's exertional
26 capacities, but raises no new issue on a substantive level. In
27 addition, however, Plaintiff glosses over the fact that after Dr.
28 Steiger's first examination in September 2004, he found that Plaintiff

1 had the ability to do only light work, while in his second report,
2 following a re-examination two months later, he found that Plaintiff
3 had the ability to do anything less than heavy work with repetitive
4 postural movements. If, in fact, both reports are postulated as
5 constituting Dr. Steiger's opinion as to Plaintiff's functional
6 limitations, then clearly, they would be inconsistent. A more logical
7 reading, which the Court has already adopted in its previous
8 discussion, is that Dr. Steiger's second report more accurately
9 reflects his objective opinion as to Plaintiff's functional
10 limitations and abilities. Further, as the Commissioner notes, the
11 ALJ erred on Plaintiff's side in finding more restrictive limitations
12 than even Dr. Steiger had found, by adopting the opinion of the ME.

13 Finally, Plaintiff's fourth issue concerns the asserted
14 incompleteness of the hypothetical question posed to the Vocational
15 Expert ("VE"). Again, this issue essentially incorporates the
16 asserted errors set forth in the first two issues, in that the
17 hypothetical questions, which are laboriously quoted in the JS, fail
18 to include limitations on repetitive twisting or a requirement that
19 Plaintiff take ten-minute breaks every hour. The Court has already
20 adjudicated these issues in its previous discussion, and nothing
21 further need be stated to adequately address this formulation of
22 asserted error. Because the Court has not found that restrictions on
23 repetitive twisting or a requirement for a ten-minute break every hour
24 are an accurate reflection of Plaintiff's RFC, they need not have been
25 included in a hypothetical question to a VE. The law is that the
26 hypothetical question need not incorporate limitations not found to be
27 applicable. See Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir.
28 2005). Consequently, the Court can find no error in the asserted

1 incompleteness of the hypothetical posed by the ALJ to the VE at the
2 hearing.

3 The decision of the ALJ will be affirmed. The Complaint will be
4 dismissed with prejudice.

5 **IT IS SO ORDERED.**

6
7 DATED: November 3, 2010

/s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE